IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPLICATION NO. 306 OF 2007

Mohd Muzaffar Mohd Tanveer. ... Applicant.

V/s.

The State of Maharashtra. ... Respondent.

Shahid Azmi for the applicant.

R.B.Thakre with A.M.Chimalkar, Special Public Prosecutor with S.S.Pednekar, A.P.P. for the State.

CORAM: V.C.DAGA, J.

DATED: 26th July 2007.

P.C.:

. Heard Mr.Shahid Azmi, learned counsel for the applicant- accused and Mr. R.B.Thakre appearing with Mr.A.M.Chimalkar, Special Public Prosecutor with Mr.S.S.Pednekar, A.P.P. for the State.

. Perused application and material on record.

2. The factual matrix in short is that on receipt of an intelligence information that some explosives and weapons were likely to be transported in a vehicle in Marathwada and Khandesh region, the team of Anti Terrorism Squad (Maharashtra), on 9th May, 2006, at

16.00 hours, intercepted one white colour Sumo motor jeep and arrested accused No.1- Mohd. Amir Shakil Shaikh and two persons including present applicant at Aurangabad.

3. The allegation against the applicant is that he was a driver of one Indica Car which accompanied the vehicle in question. The F.I.R. is produced on record. The confessional statement of the applicant-accused dated 2nd June, 2006 is also produced on record at Exh.'C', whereas confessional statements of accused Nos.1 and 9 are incorporated at Exh.'D' and Exh.'E'. The statement of the car owner is to be found at Exh.'F'.

4. It is the case of the prosecution that the applicant- accused along with other 16 accused persons are facing charges under section 120-B of Indian Penal Code read with sections 4 and 5 of Explosive Substances Act read with sections 5, 6, 9(B) of Indian Explosive Act read with sections 3, 25 of Indian Arms Act read with sections 10, 13, 16, 18 and 23 of Unlawful Activities (Prevention_ Act read with sections 3(1)(ii), 3(2) and 3(4) of the M.C.O.C.Act, 1999.

5. The huge stock of fire arms and explosive substance were seized on 9th May, 2006 at Aurangabad.

It contains 16 AK-47 rifles, 3200 live cartridges of AK-47 rifles, 62 magazines of AK-47 rifles, 16 magazine pouches, 43 kg. Of explosive substance and 50 hand grenades. The police, therefore, chargesheeted all these accused for number of offences under the relevant sections referred to herinabove and also for intention of promoting insurgency in the country by continuous unlawful activities under the M.C.O.C.Act.

6. The learned counsel for the applicant submitted that there is no evidence against the applicant except his confessional statement and some references in the confessional statement of the co-accused. He submits that the confessional statement of the applicant- accused is exculpatory as such is not a confession in the eye of law. He further submits that the applicant- accused, though, drove Indica Car which carried boxes containing explosive substance and the fire arms, but he had no knowledge about these ammunitions which were in the boxes.

7. Per contra, learned Special Public Prosecutor urged that sufficient material is available on record to establish that the present applicant- accused is

involved in the offences registered against him and that he is member of the organised crime syndicate. He further submits that the present applicant was well aware of the fact that as to how the vehicle, which he was driving, was being used for carrying explosives. The applicant- accused tried to make out a case that he requested for vehicle to one of his friend to attend the marriage of one of his friends and in that car he proceeded towards Aurangabad along with his friend Jabi, but there was absolutely no indication in his statement as to whose marriage he was to attend. That it was expected on his part to guess, as prudent person, from the talks which took place during the period when he was driving vehicle that the persons with him in the car had some plan to commit some terrorist activities. That his silence speaks volume about his involvement. That he was well aware that none of his friends sitting in the car were to attend the marriage. In wake of these facts, Mr.Thakre submits that a strong suspicion can be entertained at this stage that the applicant- accused was a member of the organised gang.

8. Mr.Thakre, in support of his above submissions, has placed reliance on the order of the learned Sessions Judge, who has, while rejecting

prayer of the application for bail, observed as under:

> "Applicant/accused had borrowed Indica from his neighbour Shoeb Patel on the pretext that he wanted to take his mother to Malegaon and promised that he would return it on the evening of the same day. Statement of Mr.patel is recorded by the police and it discloses that on the evening of that day Indica was not returned but the number place of that Indica was changed. The confession of the applicant/accused discloses that he came to know from Jabi about the explosive substances and ammunitions at Malegaon near the hospital, yet he chose to remain in the company of Jabi (wanted accused) and Sharif (Accused No.9). Despite of the knowledge he kept Indica with Dr.Sharif and went till ST stand along with wanted accused Jabi. This conduct of accused of leaving Indica with Dr.Sharif reveals active part in the conspiracy. Moreover, when he reached to Aurangabad at 12.00 to 12.30 night, he did not go to his house but he telephoned his brother-in-law and he went to his aunt's house. Indica car was not of the applicant/ accused but he has borrowed it on promise of returning it in the evening yet he left the car there and he did not contact the owner of the car but quietly went to his aunt's house where he was caught by the police. the applicant/accused has shown places where the arms and explosive substance were kept by the co-accused. Applicant/accused is a cousin brother of Amir (A-9) who was caught red-handed alongwith explosive substance and the ammunitions. Though the relation itself cannot be attributed to as an incriminating circumstance however if the facts disclose the active role played by the relatives together then that bondage is obvious. The submissions made by Ld. Spl. Prosecutor are also taken into account.
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> (emphasis supplied)

9. After having failed to obtain bail from the Sessions Court, the applicant- accused has now invoked

jurisdiction of this Court to seek bail contending that there is no material to suggest that the applicant was or is engaged in any continuing unlawful activity or that the applicant has committed any offence of the organised crime levelled against him. The submissions made before the Sessions Court were reiterated before this Court to seek bail.

CONSIDERATION :

10. Before considering rival submissions, it is necessary to turn to Section 21 (4) and (5) of the M.C.O.C.Act, 1999:-

> **21. Modified application of certain provisions of the Code.**
>
> (1) ....
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> (2) ....
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> (3) ....
>
> (4):- Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act, shall, if in custody, be released on bail or on his own bond, unless---
>
> (a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and
>
> (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while

on bail.

(5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.

(6) ....

(7) ....

11. The M.C.O.C.Act is a special legislation. No person accused of an offence punishable under this Act, if in custody, can be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application of such release and where the Public Prosecutor opposes the application, the Court has to get itself satisfied that there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. Keeping the said provisions in mind, one has to examine whether or not prima facie material is available on record to reach to the prima facie; conclusion that the applicant is not guilty of the offence alleged and that he is not likely to commit any offence while on bail.

12. Having examined the aforesaid legal position, it is not in dispute that there is confessional statement made by the present applicant- accused on

2nd June, 2006. It is no doubt true that he has retracted from his statement but the effect thereof can only be tested and decided during the course of trial. To what extent the retraction can be acted upon would be a matter of appreciation of evidence. The confessional statements of accused Nos.1 and 2, who implicate the present applicant- accused, if proved, are also sufficient to establish charge against the present applicant.

13. If the aforesaid evidence is proved or established in trial, then possibility of conviction cannot be ruled out. Apart from this, once the person is released on bail being a member of organised crime syndicate as is found in this case on the basis of prima facie material available on record, the possibility of the applicant- accused committing further offences cannot be ruled out. In this view of the matter, applicant cannot be granted bail.

14. In the result, application is rejected for the reasons recorded herein together with the reasons recorded by the learned Special Judge, M.C.O.C., Mumbai in his order dated 18th December, 2006 with which I concur and affirm.

JUDGE